INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Elmhurst Cemetery Co. v. *Commissioner*, 300 U.S. 37	6
Helvering v. *Gowran*, 302 U.S. 238	9
Malat v. *Riddell*, 383 U.S. 569	9
Moore-McCormack Lines, Inc. v. *Commissioner*, 44 T.C. 745	1, 4, 5, 7
Municipal Bond Corp. v. *Commissioner*, 341 F. 2d 683	9
Philadelphia Park Amusement Co. v. *United States*, 126 F. Supp. 184	6
United States v. *Davis*, 370 U.S. 65	6, 9
Statutes:	
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 1001	11
Sec. 1221	9
Miscellaneous:	
Treasury Regulations on Estate Tax, § 20.2031–2 (26 C.F.R., § 20.2031–2)	6, 12
Treasury Regulations on Income Tax, § 1.1001–1 (26 C.F.R., § 1.1001–1)	6, 11

263–287—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1283

SEAS SHIPPING COMPANY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 13a–38a) are not officially reported. The findings of fact and opinion of the Tax Court in the related case of *Moore-McCormack Lines, Inc.* v. *Commissioner* (Pet. 39a–67a) are reported at 44 T.C. 745. The opinion of the court of appeals (Pet. 1a–12a) is reported at 371 F. 2d 528.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1967 (Pet. 2). The petition for a writ of certiorari was filed on April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record warrants the concurrent findings of the courts below (the Tax Court and the court of appeals) that a block of 300,000 shares of common stock of Moore-McCormack Lines, Inc., which petitioner received as part consideration for the sale of certain ships to that company, had a fair market value of $9,000,000 ($30 per share) for purposes of computing petitioner's taxable gain on the sale of the ships.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and of the Treasury Regulations under the 1954 Code are set forth in the Appendix, *infra*, pp. 11–13.

STATEMENT

In March 1957 petitioner contracted to sell its fleet of ships, consisting of 12 vessels, to Moore-McCormack Lines, Inc. (Mooremac) for a total purchase price of $17,000,000, payable $8,000,000 in cash and promissory notes and $9,000,000 by 300,000 shares of Mooremac's common stock (Pet. 40a–41a).[1] These 12 ships, according to an April, 1957, report of the Ship Valuation Committee of the Federal Maritime Administration, were worth $17,700,000 (Pet. 16a; R. 262a–266a).[2]

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[1] Mooremac also agreed to employ certain key men of petitioner and to use petitioner's trade name "Robin Line" for a period of five years on the ships purchased (R. 87a–91a; Pet. 46a).

[2] "R." references are to the Appendix to petitioner's brief in the court of appeals.

Petitioner contemporaneously entered into an agreement with some of Mooremac's principal stockholders under which petitioner was entitled to name two directors. Although the 300,000 shares issued to petitioner amounted to approximately 13% of Mooremac's outstanding stock and made it the largest single stockholder of Mooremac, in the absence of this agreement petitioner would not have been assured of any representation on Mooremac's board of directors since Mooremac did not have cumulative voting. (R. 84a–86a, 192a; Pet. 16a, 45a–46a, 50a).

The contract of sale was submitted to the Federal Maritime Board for approval, and on April 25, 1957, the Board approved, stating in its letter of approval that the Mooremac stock was to be "issued to Seas [petitioner] at $30.00 per share." Petitioner objected to the reference to a $30 per share price, but the Maritime Board refused to change its letter; and on April 30, 1957, both petitioner and Mooremac accepted the Maritime Board's order of approval. (R. 98a–99a, 105a, 186a–189a, 259a, 260a–261a; Pet. 15a, 46a.)

The contract of sale provided that at the option of the buyer (Mooremac) the SS Kettering or the SS Doncaster, or both, should be excepted from the purchase, in which event the cash and notes payable would be reduced by $1,266,666 for each vessel so excluded. On April 11, 1957, Mooremac exercised its option to exclude the Kettering and Doncaster from the purchase, and petitioner then sold those two ships to unrelated third parties for nearly $200,000 more than the values ascribed to them by the contract. (Pet. 17a,

44a, 46a–47a.) Immediately after purchasing the remaining 10 ships, Mooremac resold two of them to unrelated third parties for substantially more than the values ascribed to them by the contract. The Tax Court found that the fair market value of the ships sold by petitioner to Mooremac was at least equal to the amount assigned to them in the contract. (Pet. 17a–18a, 42a–43a, 50a.)

Mooremac stock was traded on the New York Stock Exchange at a small volume. During 1957 a total of 166,000 shares were traded. The highest price was 25¼ in January and February, 1957, but the stock traded as low as 17 in December, 1957. The mean stock market trading price of the Mooremac common stock on the dates of delivery of the ships was $22.81 per share. (R. 24a; Pet. 9a, 17a, 51a, 58a.) The book value of the stock was approximately $39 per share (Pet. 51a).

The Tax Court heard the instant case shortly after *Moore-McCormack Lines, Inc.* v. *Commissioner,* 44 T.C. 745, which presented the question of Mooremac's basis for the ships purchased from petitioner, and this, of course, turned on the same issue as is presented by the instant case—*i.e.,* the fair market value of the 300,000 shares of Mooremac stock. Although the Tax Court denied a motion to consolidate the two cases, petitioner's counsel were present at the trial of the *Mooremac* case, and some of the testimony at that trial was, by agreement of counsel, carried over to and taken into the instant case in the form of exhibits (R. 238a–258a). Some of the findings of the

Tax Court in the *Mooremac* case were incorporated by reference into its findings in the instant case (Pet. 15a). Petitioner argued that the Mooremac stock was worth less than $30 (in order to minimize its gain on the sale of the ships) while Mooremac argued that the stock was worth $30 (in order to maximize its cost basis for the purchased ships). The Tax Court found as an ultimate fact in both cases that the 300,000 shares of Mooremac stock received by petitioner had a fair market value of $9,000,000, or $30 per share (Pet. 18a, 30a).

The Commissioner, being satisfied with the Tax Court's determination, defended it successfully on petitioner's appeal to the court of appeals in the instant case. Nevertheless, the Commissioner took a protective appeal from the Tax Court's decision in the *Mooremac* case; and further proceedings on that appeal are being held in abeyance pending the final outcome of the instant case.

The court of appeals in the instant case, although criticizing the Tax Court's handling of the case in some minor particulars (Pet. 6a–8a), nevertheless affirmed the decision on the ground that both the value of the ships, as to which there was ample evidence, and the provisions of the sales contract itself convincingly supported the valuation reached by the Tax Court (Pet. 9a–10a).

ARGUMENT

The issue presented by this case—the value of stock received as part consideration for the sale of certain

vessels—is primarily one of fact,[3] and the concurrent valuation finding of both courts below is amply supported by the record. There is no conflict or other reason for further review by this Court.

1. The block of 300,000 shares of Mooremac common stock here involved was received by petitioner from Mooremac in part payment for the sale of ships which were worth at least the amount paid by Mooremac in cash, notes, and stock valued at $30 per share. The values of properties exchanged in an arm's length transaction are presumed to be equal (*United States* v. *Davis*, 370 U.S. 65, 72; *Philadelphia Park Amusement Co.* v. *United States*, 126 F. Supp. 184 (Ct. Cl.)), and the courts below made no error in holding that the instant case falls within the scope of that rule. It is undisputed that the sale of the ships was a business transaction, free from donative intent, and negotiated at arm's length by competent and experienced businessmen. It cannot lightly be presumed that petitioner would have sold its ships for less than they were worth, since that would have been unfair to its stockholders. The Mooremac stock received by petitioner was valued at $30 per share in the contract of sale itself and also in the approval of the sale by the Maritime Board. Thus it was clearly recognized by the parties to the sale and by the Maritime Board that the stock was worth $30 per share. And the book value of the stock was in excess of $39 per share.

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[3] See Treasury Regulations (1954 Code) §§ 1.1001–1(a), 20.2031–2 App., *infra*, pp. 11–13; *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U.S. 37.

Although the mean stock market trading price of the Mooremac common stock on the dates of delivery of the ships was $22.81 per share, this factor is not conclusive in the particular circumstances of this case. Only a comparatively small amount of stock was traded on the Exchange (the total trading volume for 1957 was 166,000 shares), and the courts below did not err in concluding that these small market sales were entitled to little—and certainly not to conclusive—weight (Pet. 9a), in determining the fair market value of the 300,000 share transfer in question. This block of stock represented a 13% interest in a large and successful corporation, and, moreover, it carried with it various rights and assurances (such as the right to control two of the ten seats on the board of directors) which did not attach to the smaller lots of stock which were sold on the Exchange.

The Tax Court considered all of the evidence in the case (Pet. 30a), and it expressly disclaimed any reliance upon facts of record in the *Mooremac* case which were not a part of the record in the instant case (Pet. 24a). And if, despite its effort to consider each case independently, it failed in minor particulars to do so (Pet. 8a), still, this was harmless error and the court of appeals correctly so held (Pet. 8a–10a). As aptly stated by the appellate court (Pet. 9a–10a):

> It is apparent that the evidence persuasively demonstrated the arms' length nature of the exchange and there were also present factors which assured the relative fairness and equality of the considerations passing from each to the other.

The testimony concerning the value of the ships was ample and convincing. If the trading price of $22.81 were taken as the stock's value, it would mean that taxpayer had sold its ships for $2,000,000 less than they were worth—a highly unlikely occurrence. Furthermore, there was an additional item of evidence considered by the Tax Court which supported the $30 result reached. In § 7(b)(5) of the sales contract, which provided for the release of consideration to Seas by the escrow agent as the ships were delivered, the parties themselves assigned a value of $30 per share to the stock. Where parties with adverse interests are at issue over the worth of property and then agree upon the dollar amount of that worth, the agreement is very persuasive evidence of value. *Ullman* v. *Commissioner,* 264 F. 2d 305, 308 (2 Cir. 1959).[4]

2. Petitioner contends (Pet. 10–17) that the Tax Court applied an incorrect legal standard in valuing the stock in question and that the court of appeals, although recognizing this, nevertheless upheld the Tax Court's ultimate finding on the ground that it could be arrived at by applying proper standards. We do not agree. The court of appeals upheld the basic valuation test used by the Tax Court—*i.e.,* the

[4] Moreover, as stated by Judge Friendly in his concurring opinion (Pet. 11a–12a):

"To be sure, none of these arrangements would have precluded the Commissioner, who was not a party, from asserting that the Mooremac stock was not worth $30 per share if he had been so advised. But if he was satisfied to leave the parties in the bed they and the martime regulatory agency had made, I fail to perceive any legitimate basis for one of them to complain. * * *"

barter-equation method as authorized in *United States* v. *Davis, supra,* and other similar cases—as an appropriate method of valuing the block of stock involved in this case. Thus, there is no foundation for petitioner's contention that the court of appeals should have remanded the case for further findings. The situation in the instant case is materially different from cases such as *Municipal Bond Corp.* v. *Commissioner,* 341 F. 2d 683 (C.A. 8), cited by petitioner (Pet. 10, 16) (see also *Malat* v. *Riddell,* 383 U.S. 569), where the trial court had misconstrued the applicable statute (Code § 1221(1)) and thus applied an incorrect legal standard. Although the appellate court found certain infirmities in the Tax Court's handling of the case, the court of appeals held that the Tax Court's alleged errors had no material bearing on the result. Moreover, even if the Tax Court had applied the wrong criteria of value, the court of appeals was nevertheless fully justified in sustaining its decision on any correct theory. *Helvering* v. *Gowran,* 302 U.S. 238, 245.

3. Finally, petitioner urges (Pet. 17–18) that the courts below placed undue emphasis on the barter-equation method of valuation in this case. No conflict is asserted, and petitioner offers no explanation as to why it would have been willing to sell its ships for less than they were worth. The stock was valued at $30 per share in the contract of sale itself, and that value coincided with the values of the ships. If the Mooremac stock was worth only $22.81, as contended by petitioner, then in the words of the court of appeals

(Pet. 9a) "it would mean that taxpayer had sold its ships for $2,000,000 less than they were worth—a highly unlikely occurrence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1967.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. * * *

* * * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.1001–1 *Computation of gain or loss.*—(a) *General rule.* Except as otherwise provided in subtitle A of the Code, the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained. The amount realized from a sale or other disposition of property is the sum of any money received plus the fair market value of any property (other than money) received. The fair market value of property is a question of fact, but only in rare and extraordinary cases will

property be considered to have no fair market value. The general method of computing such gain or loss is prescribed by section 1001, which contemplates that from the amount realized upon the sale or exchange there shall be withdrawn a sum sufficient to restore the adjusted basis prescribed by section 1011 and regulations thereunder (i.e., the cost or other basis adjusted for receipts, expenditures, losses, allowances, and other items chargeable against and applicable to such cost or other basis). The amount which remains after the adjusted basis has been restored to the taxpayer constitutes the realized gain. * * *

* * * * *

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2031–2 *Valuation of stocks and bonds*—

(a) *In general.* The value of stocks and bonds is the fair market value per share or bond on the applicable valuation date.

(b) *Based on selling prices.* If there is a market for stocks or bonds, on a stock exchange, in an over-the-counter market, or otherwise, the mean between the highest and lowest quoted selling prices on the valuation date is the fair market value per share or bond. If there were no sales on the valuation date, but there were sales on dates within a reasonable period both before and after the valuation date, the fair market value is determined by taking a weighted average of the means between the highest and lowest sales on the nearest date before and the nearest date after the valuation date. * * *

* * * * *

(e) *Where selling prices or bid and asked prices do not reflect fair market value.* If it is established that the value of any bond or share of stock determined on the basis of selling or

bid and asked prices as provided under paragraphs (b), (c), and (d) of this section does not reflect the fair market value thereof, then some reasonable modification of that basis or other relevant facts and elements of value are considered in determining the fair market value. Where sales at or near the date of death are few or of a sporadic nature, such sales alone may not indicate fair market value. In certain exceptional cases, the size of the block of stock to be valued in relation to the number of shares changing hands in sales may be relevant in determining whether selling prices reflect the fair market value of the block of stock to be valued. If the executor can show that the block of stock to be valued is so large in relation to the actual sales on the existing market that it could not be liquidated in a reasonable time without depressing the market, the price at which the block could be sold as such outside the usual market, as through an underwriter, may be a more accurate indication of value than market quotations. Complete data in support of any allowance claimed due to the size of the block of stock being valued shall be submitted with the return. On the other hand, if the block of stock to be valued represents a controlling interest, either actual or effective, in a going business, the price at which other lots change hands may have little relation to its true value.

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